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DEPARTMENT OF JUSTICE

Executive Office for Immigration Review

8 CFR Parts 1003, 1103, 1208, 1211, 1212, 1215, 1216, 1235

EOIR No. 178

RIN: 1125-AA71

Retrospective Regulatory Review Under E.O. 13563

AGENCY: Executive Office for Immigration Review, Department of Justice.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Following the issuance of Executive Order 13563, the Department of Justice (Department or DOJ) issued a Plan for Retrospective Analysis of Existing Rules (Plan) on August 22, 2011, identifying several regulations that it plans to review during the next two years. Pursuant to that Plan, the Department is conducting a retrospective review of portions of the regulations of the Executive Office for Immigration Review (EOIR). The Department is considering proposing amendments to the EOIR regulations in parts 1003, 1103, 1208, 1211, 1212, 1215, 1216, and 1235 of chapter V of title 8 of the Code of Federal Regulations (CFR). The purpose of this Notice is to provide the public with advance notice of that future rulemaking and to request the public's input on potential amendments to the EOIR regulations.

DATES: Written comments must be postmarked and electronic comments must be submitted on or before [Insert date 60 days from the date of publication in the FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by EOIR Docket No. 178, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after Midnight Eastern Time on the last day of the comment period.
- Mail: Acting General Counsel, Jean King, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. To ensure proper handling, please reference EOIR Docket No. 178 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Acting General Counsel, Jean King, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, VA 22041. Contact Telephone Number (703) 305-0470 (not a toll-free call).

FOR FURTHER INFORMATION CONTACT: Acting General Counsel, Jean King, Office of the General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

I. Executive Order 13563

On January 18, 2011, President Barack Obama issued Executive Order (EO) 13563 directing Federal agencies to institutionalize a culture of retrospective review and

analysis through periodic review of existing significant regulations. As part of the review, each agency must determine whether any regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving its regulatory objectives. Each agency must evaluate the costs and benefits of current regulatory approaches and consider available regulatory alternatives that maximize net benefits, including consideration of potential economic, environmental, public health, and safety effects, distributive impacts, and equity. The President further stressed the need for agencies to solicit public participation regularly as part of the rulemaking process.

II. The Department's Plan for Retrospective Analysis of Existing Rules

In response to EO 13563, the Department published a Request for Information (RFI), entitled "Reducing Regulatory Burden; Retrospective Review Under E.O. 13563," on March 1, 2011, requesting the public's input on the criteria for selecting regulations to be reviewed. *See* 76 FR 11163 (Mar. 1, 2011). After review of comments received in response to the RFI and consultation with Departmental components, the Department issued its Plan identifying several regulations that it intends to review during the next two years. *See* "Plan for Retrospective Analysis of Existing Rules" (Plan), *available online at* <http://www.justice.gov/open/doj-rr-final-plan.pdf>. Based upon the public comments received, the Department selected regulations for review that: are ineffective in achieving a stated regulatory goal; require harmonization or modernization; have objectives that may be achieved through less burdensome regulatory alternatives; have actual costs and benefits that are different from those projected; are burdensome; create distributional inequities; and/or cause unintended effects. *See* Plan at 11-12, 14,-15,18.

In the Plan, the Department identified EOIR as one of the Department's principal rulemaking components that would be featured in the first two-year round of retrospective review. *See* Plan at 2. The Department noted that, prior to the Plan's issuance, EOIR had already undertaken a retrospective review of its existing and proposed regulations, and had withdrawn two pending proposed rules ("Suspension of Deportation and Cancellation of Removal for Certain Battered Spouses and Children; Motions to Reopen for Certain Battered Spouses and Children," RIN 1125-AA35, and "Rules Governing Immigration Proceedings," RIN 1125-AA53) that were no longer necessary as their intended purpose had been satisfied through other regulations, Board of Immigration Appeals (Board) precedent, and agency guidance documents. *See* Plan at 6. In the Plan, the Department also noted that EOIR has initiated a review of several of its regulations in response to petitions for rulemaking and meets regularly with affected parties to discuss a wide range of agency practices, including rulemaking. *See* Plan at 7.

The purpose of this Notice is to provide advance notice to the public that the Department is considering proposing amendments to the EOIR regulations in the upcoming year, and to solicit comments from the public about specific amendments being considered, as well as other amendments to meet the objectives of EO 13563's retrospective analysis provisions. The Department has selected specific EOIR regulations to review during the first two-year round of retrospective review. The Department will be reviewing additional portions of the EOIR regulations in future rulemakings. The Department envisions that this future review will be a multi-year initiative to enhance the EOIR regulations.

III. Retrospective Review of EOIR Regulations

In response to the RFI, the Department received several public comments requesting review of the EOIR regulations addressing practices and procedures before the immigration judges and the Board. The commenters requested amendment or repeal of various provisions of the EOIR regulations at parts 1003, 1208, 1240, and 1241. The commenters also requested promulgation of regulations to address ineffective assistance of counsel, discovery in proceedings before EOIR, and procedures for “repapering” (termination of deportation proceedings and reinstatement of proceedings as removal proceedings) for certain aliens rendered ineligible for relief from deportation.¹ After review of these comments, the Department selected the specific regulations in chapter V of title 8 of the CFR that EOIR would review as part of the first two-year round of retrospective review. The Department selected for review the EOIR regulations at parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235, and, for limited purposes, part 1208.

In response to the public’s comments, the Department will consider substantive amendments to the EOIR regulations at part 1003, including those addressing stays, telephonic or video hearings. In addition, the Department is considering other substantive amendments to the regulations at part 1003, including those governing venue, bond proceedings, and the authority and jurisdiction of the immigration judges and the Board. In particular, the Department is considering regulatory amendments to part 1003 that may improve the efficiency and fairness of adjudications before EOIR.

EOIR notes that, given the volume of substantive comments received, it will not be able to address during this round of retrospective review all regulatory provisions for

¹ Information on a proposed rulemaking of the former Immigration and Naturalization Service (INS) addressing repapering for certain aliens rendered ineligible for relief from deportation can be found in the Fall 2000 edition of the Unified Agenda of Regulatory and Deregulatory Actions. See “Unified Agenda of Regulatory and Deregulatory Actions” (Unified Agenda), *available online at* <http://www.reginfo.gov>; *see also* 65 FR 71273 (Nov. 30, 2000),

which it received public comments. In particular, the Department received several substantive comments requesting review of certain regulatory provisions of part 1208, including the regulatory provisions addressing hearing notices, *in absentia* decisions, the one-year filing deadline for asylum applications, and filing procedures with the immigration courts. The Department also received several substantive comments requesting review of part 1240, including the regulatory provisions addressing mental competency issues in proceedings before EOIR, voluntary departure, and jurisdiction over applications for relief filed pursuant to section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA). The Department also received a comment requesting that the regulations at part 1241 be revised to require that, in order for an alien to be removed, a functioning government must exist in the country to which the alien is ordered removed. During a future round of retrospective review, the Department will also review and consider amendments to the other regulatory provisions at parts 1208, 1240, and 1241 for which it received public comments.

EOIR further notes that several of the issues addressed by commenters are already the subject of separate pending rulemakings and/or petitions for rulemaking and may continue to be addressed through those separate rulemakings, rather than as part of this retrospective review. In particular, this Notice will not address the following issues that are currently under consideration in other pending rulemakings: regulatory provisions at part 1003 addressing the streamlining of Board adjudication (“Board of Immigration Appeals: Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents,” RIN 1125-AA58, EOIR No. 159); and, regulatory provisions at parts 1003 and 1208 addressing ineffective assistance of counsel (“Motions to Reopen

Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel,” RIN 1125-AA68, EOIR No. 170).² The Department also plans to initiate a separate rulemaking proceeding to address the regulatory provision known as the “departure bar.”³ In addition, the Department is considering whether to initiate a rulemaking proceeding addressing an alien’s mental competency in proceedings before EOIR.

As provided in the Plan, this round of retrospective review will also focus on reviewing and amending the selected EOIR regulations to eliminate duplication, ensure consistency with the Department of Homeland Security’s (DHS) regulations in chapter I of title 8 of the CFR, and delineate clearly the authority and jurisdiction of each agency. EOIR believes that such amendments to its regulations will improve the efficiency and fairness of adjudications before EOIR. Such regulatory amendments will reduce the likelihood of the public misfiling applications and petitions and the amount of time spent by immigration judges and agency personnel in explaining and assisting the public in navigating each agency’s authority and jurisdiction. In addition, by eliminating the duplication in regulations, the Department will no longer be required to pay for printing the duplicative regulations as part of the annual publication of the Code of Federal Regulations. Thus, such regulatory amendments will result in resource, time, and financial savings to EOIR, as well as streamline the adjudicatory process for individuals appearing before the agency.

² EOIR encourages the public to review the Unified Agenda to learn about and comment on pending EOIR rulemakings. *See* Unified Agenda, *available online at* <http://www.reginfo.gov>.

³ The “departure bar” is the regulatory provision at 8 CFR 1003.2(d) and 1003.23(b)(1) that prohibits an alien from filing a motion to reopen or reconsider with the Board or immigration courts after his or her departure from the United States. This regulatory provision also renders a motion to reopen or reconsider withdrawn if the alien departs the United States while the motion is pending.

Currently, many EOIR regulations are duplicative of DHS regulations. The overlap in regulations occurred as a result of the Homeland Security Act of 2002 (HSA), as amended, which transferred the functions of the former INS from the DOJ to DHS. However, the HSA retained under the authority of the Attorney General the functions of EOIR, a separate agency within the DOJ. As the existing regulations at that time often intermingled the responsibilities of the former INS and EOIR, this transfer required a reorganization of title 8 of the CFR in February 2003, including the establishment of a new chapter V in title 8 of the CFR pertaining to EOIR. *See* 68 FR 9824 (Feb. 28, 2003). The time available did not permit a thorough review of each provision where the responsibilities of EOIR and the former INS were intermingled. Therefore, a number of regulations pertaining to the responsibilities of DHS were intentionally duplicated in the new chapter V because those regulations also included provisions relating to the responsibilities of EOIR. Accordingly, chapter V contains many instances where the EOIR regulations duplicate the DHS regulations.

The Department has already eliminated some of the duplication. For example, the Department revised the provisions in 8 CFR part 1274a that duplicate 8 CFR part 274a. *See* 74 FR 2337, 2339 (Jan. 15, 2009); 76 FR 16525 (Mar. 24, 2011). As these duplicative regulations principally pertained to DHS' control of the employment of aliens, the Department removed the duplicative regulations in part 1274a and added a new section that cross-references the DHS regulations at 8 CFR part 274a. *See id.* The Department similarly revised the provisions in 8 CFR part 1280, which duplicated 8 CFR part 280. *See* 76 FR 74625, 74628-74629 (Dec. 1, 2011). As these duplicative regulations principally pertained to the authority of DHS to impose fines and civil

monetary penalties, the Department removed the duplicative provisions in part 1280 and added a new section that cross-references the DHS regulations at 8 CFR part 280 and the EOIR regulations governing the Board's appellate authority at 8 CFR part 1003. *See id.* Most recently, the Department amended its regulations at 8 CFR parts 1003 and 1292 governing the discipline of practitioners before EOIR and DHS, in part to remove unnecessary regulations pertaining to DHS's responsibilities and to insert cross-references to the appropriate DHS regulations. *See* 77 FR 2011, 2012-2013 (Jan. 13, 2012).

In addition, DHS has been revising some of its regulations, which has had the unintended result of creating inconsistencies between the revised versions of the DHS regulations and the DOJ regulations, which continue to track the earlier version of the DHS regulations. *See* 76 FR 53764 (Aug. 29, 2011) (making extensive amendments to the DHS regulations at 8 CFR chapter I); 76 FR 73475 (Nov. 29, 2011) (finalizing the 2011 amendments to the DHS regulations at 8 CFR chapter I); 73 FR 18384 (Apr. 3, 2008) (revising 8 CFR parts 212 and 235).

Therefore, as part of the Department's ongoing effort to ensure that its regulations are clear, effective, non-duplicative, and up-to-date, the Department will be reviewing 8 CFR parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235 during this first two-year round of retrospective review. The Department will amend these EOIR regulations to eliminate those provisions that are unnecessarily duplicative and, in some cases, inconsistent with DHS regulations, and to ensure that they make clear the distinct responsibilities of DHS and EOIR and, where appropriate, include cross-references to the applicable DHS regulations. In addition to the substantive amendments to part 1003 discussed above, the

Department will also consider substantive amendments to parts 1103, 1211, 1212, 1215, 1216, and 1235.⁴ As with part 1003, the Department is considering regulatory amendments to parts 1103, 1211, 1212, 1215, 1216, and 1235 that may improve the efficiency and fairness of adjudications before EOIR.

The following is a summary of the amendments that the Department is currently considering during this round of the retrospective review:

Global amendments

For parts 1003, 1103, 1208, 1212, 1215, 1216, and 1235, the Department intends to standardize citations and terms to ensure consistency within the EOIR regulations and with respect to the DHS regulations.⁵ The Department intends to amend the EOIR regulations to standardize the capitalization of terms such as “Immigration Court,” “immigration judge,” “court administrator,” and “the Act,” standardize internal citations to titles 8 of the CFR and the U.S. Code (U.S.C.), standardize references to the Board of Immigration Appeals, update references to DHS, such as revising the term “the Service” as “DHS” and the term “Office of the District Counsel” as “Office of the Chief Counsel,” and change, as appropriate, “shall” to “must” to indicate mandatory language.

Part 1003

Part 1003 addresses, in part, matters exclusively before EOIR, including procedures before the immigration judges and the Board. However, part 1003 also contains provisions, such as those addressing the List of Free Legal Services Providers and the professional conduct of practitioners, which affect both EOIR and DHS. As a

⁴ See discussion *infra*.

⁵ During this round of retrospective review, the Department intends to review part 1208 for the limited purposes of standardizing citations and terms, and updating references. As noted above, the Department intends to consider other amendments to part 1208 during a future round of retrospective review.

part of the retrospective review, the Department will only focus on the subparts in part 1003 addressing matters exclusively before EOIR: subparts A (Board of Immigration Appeals), B (Office of the Chief Immigration Judge), and C (Immigration Court –Rules of Procedure). Subparts E and F will be addressed through two separate rulemakings: “List of Pro Bono Legal Service Providers for Aliens in Immigration Proceedings,” RIN 1125-AA62, EOIR No. 164P, *see* Unified Agenda, *available online at* <http://www.reginfo.gov>, and “Reorganization of Regulations on the Adjudication of Department of Homeland Security Practitioner Disciplinary Cases,” *see* 77 FR 2011 (Jan. 13, 2012).⁶

In response to the RFI, the Department received several public comments requesting substantive amendments to part 1003, including requests to review the regulatory provisions governing stays, telephonic or video hearings, the “departure bar,”⁷ and procedures addressing the streamlining of Board adjudication and the review of custody / bond determinations for arriving aliens. In response to these comments, the Department is currently reviewing and considering amendments to the regulatory provisions in part 1003 addressing motions and stays. *See* 8 CFR 1003.19(i), 1003.23. The Department is also reviewing the regulatory provisions in part 1003 addressing venue and telephonic and video hearings, which is the subject of a pending rulemaking (“Jurisdiction and Venue in Removal Proceedings,” RIN 1125-AA52, EOIR No. 147). *See* Unified Agenda, *available online at* <http://www.reginfo.gov>; *see also* 8 CFR 1003.20. In addition, the Department is currently evaluating whether to provide for separate appearances in bond proceedings. As discussed above, the Department is

⁶ Subpart D in 8 CFR part 1003 is currently reserved and, thus, not the subject of review.

⁷ *See supra* note 3.

reviewing streamlining of Board adjudication through a separate rulemaking and plans to initiate a separate rulemaking proceeding addressing the “departure bar.”

In addition to reviewing part 1003 in response to public comments, the Department is reviewing other provisions in part 1003 to ensure that the regulatory provisions appropriately and adequately address the authority and jurisdiction of the immigration judges and the Board. For example, the Department is currently reviewing the regulatory provisions addressing the Board’s appellate jurisdiction in section 1003.1(b). The Department is also considering revising part 1003 to reflect updated procedures related to forms, including, for example, the requirement in section 1003.15(d) that an alien must also file the Form EOIR-33, Alien’s Change of Address, if he or she has changed his or her phone number.

The retrospective review of part 1003 will also examine updates to the EOIR regulations to reflect current procedures and to eliminate duplicative and inconsistent provisions. In addition to the global amendments already discussed, the Department intends to change citations to the DHS regulations to the EOIR regulations where appropriate and update any incorrect or outdated citations. For example, in section 1003.1(b)(1), the Department is considering changing the citation to 8 CFR part 240 to 8 CFR part 1240 and, in section 1003.1(f), changing part 292 to part 1292.

EOIR requests the public’s comments on the potential amendments to part 1003 discussed in this Notice. For background information, EOIR encourages the public to review pending rulemakings affecting part 1003 in the Unified Agenda. EOIR also invites the public to provide any additional proposed amendments to part 1003.

Part 1103

Part 1103 addresses procedures before the DHS Administrative Appeals Unit (AAU) and is substantively duplicative of the DHS regulations at part 103. In addition, the duplicative EOIR regulations at part 1103 are no longer consistent with the DHS regulations at part 103, which were revised in 2011. *See, e.g.*, 76 FR 53764, 53780. The Department anticipates proposing amendments to part 1103 that would remove the provisions that are duplicative of the DHS regulations at part 103, retaining the provisions addressing the Board's jurisdiction and adding a cross-reference to the applicable DHS regulations at part 103.

Part 1103 also contains provisions addressing the payment of fees to the Board. Part 1003, which addresses only procedures before EOIR, also contains provisions addressing the payment of fees to the Board. The Department is considering revising part 1103 by removing the regulatory provisions addressing the payment of fees to the Board and consolidating those provisions in part 1003. EOIR welcomes public comment on the potential reorganization of the provisions addressing the payment of fees to the Board, as well as other improvements to part 1103.

Part 1208

Part 1208 addresses procedures for asylum and withholding of removal. As discussed above, the Department will review and consider amendments to the regulatory provisions at part 1208 during a future round of retrospective review. However, as noted above, the Department intends, during this round of retrospective review, to review part 1208 for the limited purpose of standardizing citations and terms, and updating references.

Part 1211

Part 1211 addresses DHS' waiver of the documentary requirements for returning legal permanent residents. While the EOIR regulations at part 1211 focus on the alien's ability to renew his or her waiver application before an immigration judge, the DHS regulations at part 211 contain detailed procedures addressing DHS' initial adjudication of such waivers. The Department intends to amend the EOIR regulations to delineate further that the initial adjudication of such waivers is before DHS but that an alien may renew his or her waiver application before an immigration judge. In particular, similar to the amendments previously made to parts 1274a and 1280, the Department is contemplating amending part 1211 by adding a cross-reference to the applicable DHS regulations at part 211. *See, e.g.*, 76 FR 16525 (addressing amendments to part 1274a); 74 FR 2337 (finalizing amendments to part 1274a); 76 FR 74625 (addressing amendments to part 1280). The Department will retain in part 1211 the regulatory provision addressing an alien's ability to renew his or her waiver application before an immigration judge.

Part 1212

Part 1212 addresses DHS' documentary requirements for nonimmigrants, including waivers of documentary requirements, admission of certain inadmissible aliens, and parole. Part 1212 is substantively duplicative of the DHS regulations at part 212. In addition, the duplicative EOIR regulations at part 1212 are no longer consistent with the DHS regulations at part 212, which were revised in 2008, 2009, and 2011. *See, e.g.*, 73 FR 18384, 18415; 74 FR 55726, 55734 (Oct. 28, 2009) (referring to the Department's planned review of parts 1212, 1215, and 1235); 76 FR 53764, 53786.

While part 1212 is substantively duplicative of the DHS regulations at part 212, several provisions in part 1212 address matters under the authority and jurisdiction of EOIR. For example, part 1212 includes regulatory provisions addressing the Board's jurisdiction over waivers of inadmissibility for nonimmigrants under section 212(d)(3) of the Act. *See, e.g.*, 8 CFR 1212.4(b); *see also* 8 CFR 1003.1(b)(6). The Department intends to amend part 1212 to distinguish between the authority and jurisdiction of EOIR and DHS, removing any provisions that are no longer within the Attorney General's jurisdiction and do not need to be restated in the EOIR regulations. *See, e.g.*, 74 FR 55726, 55734.⁸

Part 1215

Part 1215 addresses DHS' control of aliens departing from the United States and is duplicative of the DHS regulations at part 215. The Department intends to amend part 1215 to remove any provisions that are no longer within the Attorney General's jurisdiction and do not need to be restated in the EOIR regulations. *See, e.g.*, 74 FR 55726, 55734. In particular, the Department will amend part 1215 by removing the provisions that are duplicative of the DHS regulations at part 215 and adding a cross-reference to the applicable DHS regulations at part 215.

Part 1216

Part 1216 addresses DHS' procedures for adjudicating conditional lawful permanent resident status and is duplicative of the DHS regulations at part 216. The Department will amend part 1216 to remove any provisions that are no longer within the Attorney General's jurisdiction and do not need to be restated in the EOIR regulations.

⁸ Note that the Department has already revised 8 CFR 1212.5 to remove DHS-related regulatory provisions for the granting of parole. *See* 69 FR 69490, 69497 (Nov. 29, 2004).

See, e.g., Matter of Herrera Del Orden, 25 I&N Dec. 589 (BIA 2011) (addressing the scope of an immigration judge's authority under 8 CFR 1216.5(f) to review DHS' denial of an alien's petition for a waiver of the requirement to file a joint petition to remove the conditional basis of his or her permanent residence). In particular, the Department intends to amend part 1216 by removing the provisions that are duplicative of the DHS regulations at part 216 and adding a cross-reference to the applicable DHS regulations at part 216.

Part 1235

Part 1235 addresses DHS' inspection of persons applying for admission to the United States and is substantively duplicative of the DHS regulations at part 235. In addition, the duplicative EOIR regulations at part 1235 are no longer consistent with the DHS regulations at part 235, which were revised in 2008, 2009, and 2011. *See, e.g.*, 73 FR 18384, 18416; 74 FR 55726, 55739; 76 FR 53764, 53790. While part 1235 is substantively duplicative of the DHS regulations at part 235, several provisions in part 1235 address matters under the authority and jurisdiction of EOIR. For example, part 1235 includes procedures for an alien in expedited removal proceedings under section 235 of the Act, and who receives a positive credible fear finding from DHS, to request asylum before an immigration judge in regular removal proceedings under section 240 of the Act. *See, e.g.*, 8 CFR 1235.3(b)(4); *see also* 8 CFR 1208.30(a). Similar to the other parts under review, the Department intends to amend part 1235 to distinguish between the authority and jurisdiction of EOIR and DHS, removing any provisions that are no longer within the Attorney General's jurisdiction and do not need to be restated in the EOIR regulations. *See, e.g.*, 74 FR 55726, 55734. In particular, the Department intends to

amend part 1235 by removing the provisions that are duplicative of the DHS regulations at part 235 and adding a cross-reference to the applicable DHS regulations at part 235 and the applicable EOIR regulations at part 1208.

In addition to the comments that the Department received in response to the RFI, the Department is also reviewing a public comment that DHS received in response to its retrospective review recommending amendments to part 1235. *See* “Reducing Regulatory Burden; Retrospective Review Under Executive Order 13563,” *available online at* <http://edocket.access.gpo.gov/2011/pdf/2011-5829.pdf>; *see also* “Preliminary Plan for Retrospective Review of Existing Regulations,” *available online at* <http://www.gpo.gov/fdsys/pkg/FR-2011-06-06/pdf/2011-13801.pdf>.⁹ In particular, the commenter requested promulgation and amendment of DHS and EOIR regulations in order to delineate the authority and jurisdiction of each agency to review the U.S. citizenship claims of aliens in expedited removal proceedings. As a result, the Department is considering whether to amend the EOIR regulations addressing an immigration judge’s review of an alien’s claim to U.S. citizenship status if DHS places the alien in expedited removal proceedings. The Department notes that there is no current regulatory procedure for DHS or an alien in expedited removal proceedings to appeal to the Board for review of an immigration judge’s status determination for an alien claiming U.S. citizenship. *See Matter of Lujan-Quintana*, 25 I&N Dec. 53, 55-56 (BIA 2009) (finding that the Board lacks jurisdiction to review an appeal by DHS of an immigration judge’s decision to vacate an expedited removal order after a claimed status

⁹ Comments received by DHS in response to “Reducing Regulatory Burden; Retrospective Review Under Executive Order 13563” are available for viewing at <http://www.regulations.gov> and may be accessed with Docket No. DHS-2011-0015.

review hearing pursuant to 8 CFR 1235.3(b)(5)(iv), at which the immigration judge determined the individual to be a U.S. citizen).

The Department is considering amending the regulations at parts 1003 and 1235 to address this issue. One approach that the Department is considering is providing for an appeal process to the Board of an immigration judge's determination of status for an alien claiming U.S. citizenship in expedited removal proceedings. EOIR welcomes public comment on the need for addressing this issue, the proposed approach discussed in this Notice for addressing this issue, and any additional approaches.

IV. Public Comments

EOIR welcomes the public's comments on the proposed amendments to parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235 summarized in this Notice. EOIR is particularly interested in receiving examples of where the EOIR regulations should be amended to distinguish more effectively between the authority and jurisdiction of EOIR and DHS. *See, e.g., Matter of Herrera Del Orden, supra.* EOIR is also particularly interested in regulatory amendments that may improve the efficiency and fairness of adjudications before EOIR. The potential amendments to parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235 discussed in this Notice are not exhaustive. EOIR invites the public to provide any additional proposed amendments to these regulatory provisions, including opportunities for eliminating unnecessary or duplicative provisions, revising confusing or outdated language, and updating statutory or regulatory citations. EOIR also invites commenters to provide information about the effects of proposed amendments, including information to assist the Department in monetizing or quantifying the benefits and costs of amendments, as well as identifying qualitative benefits and

costs. For example, EOIR welcomes data from the public on whether and by how many hours – actual or billable – these regulatory amendments may reduce the time spent by aliens and practitioners in determining how or where to file applications and/or petitions with each agency. EOIR further welcomes data on how much time and money aliens and practitioners spend in redrafting and/or resending applications and petitions that were misfiled and returned to the sender.

This round of the retrospective review is focused, at this point, only on parts 1003, 1103, 1211, 1212, 1215, 1216, and 1235, as well as, for limited purposes, on part 1208. As noted, the Department intends to review additional portions of the EOIR regulations in the future. In future rulemakings, the Department will also be considering amending the overall organization of the EOIR regulations so as to consolidate related regulatory provisions in one part. For example, the Department is considering consolidating all regulatory provisions related to representation and appearances in part 1292 by moving such provisions within part 1003 to part 1292. In anticipation of this future review and potential reorganization, EOIR also requests the public's comments on any additional amendments to its regulations, including opportunities for more effectively delineating the authority and jurisdiction of EOIR and DHS and improving the efficiency and fairness of adjudications before EOIR.

Comments that will provide the most assistance to EOIR will reference a specific regulatory section, provide draft regulatory language, explain the reason for the recommended amendment, and include data, information, or authority that support the recommended amendment. EOIR encourages those members of the public submitting comments to review those comments described in the Department's Plan. *See* <http://www.regulations.gov>.

____September 19, 2012____
Date

Juan P. Osuna
Director

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